

May 11, 2006

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Re: *State of Delaware v. Paul Wade*
Case No.: 0504001095

Date Submitted: April 28, 2006
Date Decided: May 11, 2006

LETTER OPINION

Dear Counsel:

A criminal restitution hearing in the above captioned matter took place on Friday, April 28, 2006 in the New Castle Court of Common Pleas. The Court previously ordered a Presentence Investigation for purposes of determining restitution following the defendant's guilty plea to Criminal Trespass, Third Degree, 11 *Del. C.* §84, before this Court on October 24, 2005. The Defendant, Paul Wade ("Wade") plead guilty on that date; was fined \$100.00 plus 18% to the Victim's Compensation Fund, costs, and a No Unlawful Adverse Contact Order was placed with Artesian Water Company, Inc. for twelve (12) months.

The Investigative Services Office previously recommended on February 8, 2006 that an evidentiary hearing be scheduled before a Judge of this Court.

This is the Court's Final Order and Decision following the hearing held as reference above.

THE FACTS

Ryan Belcher (“Belcher”), an Artesian Water Company employee testified at trial. Belcher observed the defendant’s motor vehicle at the Wrangle Hill Road site near elevated storage tanks. The defendant’s vehicle was stuck in mud at the Artesian site and the Delaware State Police were called and subsequently arrested Mr. Wade and transported him to Court 18. Wade admitted ownership of the pick-up truck that was stuck in the ground with traffic marks with divots caused by the spinning of the tires and the vehicle being stuck in the mud.

State’s Exhibit 1 for identification, a series of photographs were introduced by the State with no objection. The photographs were taken by Mr. Belcher when he responded to the scene at Artesian’s property on March 24, 2005. The Ford pick-up owned by Wade was golden color. There was property damage, turfing, torn up grass and mud at or near the location of the pick-up truck owned by Wade. Most, if not all, of the tire tracks on the property were on Artesian’s land.

Belcher testified Wade does not own the subject property and that it is in New Castle County.

On cross-examination Belcher testified Artesian “probably leased the property” but has clear tenancy rights. Artesian is also responsible for maintaining the property according to the Lease.

Defense’s Exhibit 1 was introduced into evidence, which was a series of photographs. Belcher testified that he has not seen any heavy equipment, but has seen other ATVs; motor vehicles; and trucks on or about the property. Belcher never saw farm vehicles depicted in Defense’s Exhibit 1 on Artesian’s property, but does concede other ATVs, trucks, etc. have previously been cited on Artesian’s property.

Belcher testified that a censor “goes off” and then 911 is called and Security is notified when an incident such as Wade’s trespassing occurs on Artesian property.

On re-direct, Belcher testified that he did not see any other trucks, ATVs or motor vehicles make the subject damage to Artesian’s land depicted in State’s Exhibit 1.

Chris Thurlow (“Thurlow”) was sworn and testified. He is an employee and Maintenance supervisor of Artesian. State’s Exhibit 2 was introduced without objection. State’s Exhibit 2 is a list of work performed by the facilities management department at the Wrangle Hill site on Route 72 caused by Artesian Water Company, Inc. to restore the property. The total costs as detailed in State’s Exhibit 2 are \$1,311.00 for repairs and includes the following:

- “* 1 load of stone to fill ruts around the base of tank/\$15.00 a tone
@ 20 tons = \$300.00
- * 6 yards of screened topsoil @ \$20.00 a yard = \$120.00
- * Excavator to spread and grade topsoil and stone \$20.00 an hour
for 8 hours = \$160.00
- * Seed and straw – 1 bag of trinity seed \$73.00 and 4 bales of
straw @ \$4.50 a bale = \$91.00
- * Maintenance truck \$20.00 an hour @ 8 hours = \$160.00
- * Labor charges – Foreman/Operator \$35 an hour @ 8 hours =
\$280.00
- * Laborer \$25 an hour @ 8 hours = \$200.00
- \$1,311.00 Total for Repairs”

Thurlow testified he was asked by Artesian Management to prepare a bill and use Artesian’s own employees to repair the damage allegedly caused by the defendant’s pick-up truck. The work involved spreading topsoil, use of an excavator to spread and grade topsoil, spreading seed and straw, use of a maintenance truck and labor charges for a foreman and an operator. The foreman was paid \$35.00 per hour at 8 hours and the labor was \$25.00 per hour at 8 hours.

While these employees were working to repair the alleged damage caused by the defendant, Thurlow testified they could do no other work for Artesian.

On cross-examination Thurlow testified that he was on the jobsite during the time on a limited basis to supervise the laborer and foreman but was not present the entire time the repair work was completed. One laborer and employee, as indicated in State's Exhibit 2 was used for the subject work. Actual labor charges were for "foreman/operator at \$35 an hour @ 8 hours" and laborer \$25 an hour @ 8 hours".

The topsoil came from Artesian Water Company's supply according to Thurlow.

Thurlow was later informed that a new procedure has been implemented by Artesian, but at the instant time he performed the repair work he used a billable hour basis with Artesian employees and foreman to "cost out the job". Artesian now has a list of fees for appropriate equipment, workers, laborers, backhoes, etc., which is to be used in the future on repair sites.

Thurlow's instructions by Artesian Management was to fix "all the damage" caused by Mr. Wade's truck caused by the criminal trespass on Artesian's property.

Defense's Exhibit 2 was moved into evidence is a series of photographs without objection. The damages depicted in the photographs around the tank depict "donuts" allegedly caused by Wade's truck. However, Thurlow testified that he did not actually see Wade do the instant damage.

On redirect, Thurlow testified on March 24, 2006 there was no other scheduled repairs and the labor and foreman who performed the instant work would have been doing other Artesian work instead of the instant repair work.

The defense presented its case-in-chief. Paul Wade ("Wade") was sworn and testified. He testified that he "was just messing around on Artesian's property" and was showing his son and daughter deer on the Artesian property. Wade claims that he did not perform or do all the damage depicted in the State's photographs. He testified that he has seen other ATVs and motor

vehicles on the property, including farm equipment. Before he actually got stuck Wade testified that he saw ATVs, farm equipment and a pick-up truck also stuck on the property and claims the damages requested by the State of \$1,311.00 is clearly excessive. Wade also testified that he did not perform “donuts” around the tower on Artesian’s property. The photographs in State’s Exhibit 1 depicting his truck stuck in the property is the only damage directly attributable to his guilty plea to trespassing on Artesian’s property according to Wade. Wade claims he got stuck “near the tower” in a straight line and did not do any damages or donuts on any other of Artesian’s property. Wade also went to the County office to review County and State maps to determine who actually owns the subject property and learned Artesian leases it.

A receipt for a 10 pound bag of seed was moved into evidence by defendant. (Defense Exhibit 2). Wade paid cash in the amount of \$26.00 for a 10 pound bag and believes the \$73.00 figure for reseeding provided by the State is excessive. Wade also claims with this amount of seed he could have repaired all the subject damage on Artesian’s property caused by his pick-up truck.

The receipt was marked as Defense’s Exhibit 3 and was introduced with no objection.

Finally, Wade claims all the repairs, including the foreman and laborer are excessive and are not a direct result of his no contest plea to the Trespass charge. Wade believes other motor vehicles and ATVs caused the damage.

Through his attorney at closing, Wade believes Artesian is looking for a windfall.

THE LAW

In *Pratt v. State*, Del. Supr., 486 A.2d 1154 (1983), the Court enunciated and articulated guidelines for the award of restitution to assist trial courts that have criminal jurisdiction. The following guidelines are used in determining restitution;

- 1) Victim Loss Statements used by the Police and/or the Presentence Office must be changed to ask for market value as opposed to replacement value or replacement costs.
- 2) Whenever possible, a Victim Loss Statement should be contemplated by the victim who must include a receipt or other verification of the Loss Statement.
- 3) A letter informing the victim the right to seek restitution must accompany the Loss Statement.
- 4) Restitution is discretionary and its imposition shall be governed by 11 *Del. C.* §4106(a).
- 5) Restitution should be ordered when the victim has suffered an actual monetary loss through personal injury, damage to, or destruction or theft of property.
- 6) Restitution should cover the victim's out-of-pocket expenses and losses as a first priority; losses covered by insurance are the lowest priority.
- 7) The defendant's ability to pay is an element to be considered in determining the amount of restitution and the schedule of payments.

See, Pratt v. State, 486 A.2 at 1161.

The State bears the burden of proving the amount of loss by a preponderance of evidence. *Benton v. State*, Del. Supr. 711 A.2d 792 (1998). It is also clear that the defendant must make restitution to a victim for the consequences of a criminal act. 11 *Del. C.* §4106(a). A plea of guilty can establish responsibility to make restitution. *See State v. Orzechowski*, 1980 W.L. 4749, *3 (Del. Fam. Ct.). Further, the amount of restitution is “not necessarily limited to the trial evidence necessary to establish guilty beyond a reasonable doubt.” *Benton v. State*, Del. Supr., 711 A.2d 792, 796 (1998).

As provided in *State v. Kathryn L. Wharton*, 1992 Del. Super., LEXIS 309 (January 16, 1992), the Court may note as follows:

In the analysis of legislative history and intent, the Delaware Supreme Court recognizes the purpose of the statute was “to make offender’s liability for restitution for property which has been lost or severely damage as a result of their crime. *Id.* at 115; *citing Report of the Adhoc Committee on Restitution* at 11 (June 1981).

In general, “there is no statutory requirement that a defendant’s ability to pay be considered in determining restitution. *Pratt*, *Supra* at 1160. The Court recognizes that the Committee recommended limiting restitution when the defendant’s ability to

pay is in question. *Id.* at 1158. For these reasons, the Court in *Pratt* suggested the Courts follow the guidelines set forth [in *Pratt*], one of which suggested defendant's ability to pay as one element to be considered by the Court.

OPINION AND ORDER

The Court has carefully construed and weighed the trial evidence including the oral testimony of all the State and Defense fact witnesses and the documentary exhibits stipulated into evidence by the State and defense. Based upon the burden of proof, which is the preponderance of evidence, it is clear to the Court the actual monetary loss sustained by Artesian Water Company, Inc. caused by the trespass by the defendant Wade is \$700.00. The Court finds \$700.00 is an appropriate measure of actual damages which Artesian sustained as a result of the criminal trespass by the defendant on Artesian's property. Clearly the defendant drove his pick-up and trespassed on Artesian's property. By his own admission was "messing around" by spinning his tires and causing his truck to get stuck in the mud at the Artesian site. Looking at the totality of circumstances and the preponderance of evidence standard and the pictures introduced by both sides at trial, it is clear that the State proved \$700.00 in actual damages.

The Court has arrived at this figure after a careful examination of Artesian's cost estimate for the total of repairs made by its own employees to repair the subject property and a careful review of both sides version of the photographs moved into evidence. The Court has also carefully reviewed the trial testimony of both the State and defense witnesses. It was only through the defendant's criminal act of trespass that Artesian sustained these damages. The Court finds very convincing the State's photographs depicting Wade's truck deeply embedded in the soil as well as the tire marks before and after the truck depicting the damages. State's Exhibit 1.

The defendant is correct that he is not responsible for all the damages depicted in the subject photographs, but clearly of the \$1,311.00 requested by the State, defendant is responsible for \$700.00 of the actual damages sustained by Artesian to repair to the property after defendant's criminal acts.

The defendant is directed to report to the Criminal Clerk of the Court to make payment arrangements for this restitution which monies shall thereafter be forwarded to Artesian. If a lump sum is possible, the Court directs defendant to pay the subject restitution damages in full. The Criminal Court Clerk is directed to forward the same to Artesian Water Company, Inc. If no lump sum payment can be made, the Criminal Clerk shall arrange a payment schedule with the defendant and monitor the same to ensure full compliance with this Order.

IT IS SO ORDERED this 11th day of May, 2006.

John K. Welch
Judge

/jb
cc: Theresa Bleakly, Clerk of the Court
CCP, Criminal Division